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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of Sections	)	
of the Cable Television Consumer	)	MM Docket No. 92-266
Protection and Competition	)	
Act of 1992	)	
	)	
Rate Regulation	)	

TO: The Commission

COMMENTS OF THE CITY OF LAKEVILLE
(the "City")

The City of Lakeville hereby submits these reply comments in the above-captioned proceeding. The Federal Communications Commission ("FCC" or "Commission") seeks comments on proposed rules to implement Sections 623, 612 and 622 (c) of the Communications Act of 1934, as amended by Sections 3, 9 and 14 of the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act").

Time did not permit the City of Lakeville to submit initial comments to the Commission. We have reviewed the comments filed by several groups and organizations, and strongly support the comments made by the following groups: the National Association of Telecommunications Officers and Advisors, the National League of Cities, the United Conference of Mayors, and the National Association of Counties.

In addition to the aforementioned national groups, The City of Lakeville fully supports the local Minnesota comments filed by the Cities of Arden Hills, Falcon Heights, Lauderdale, Little Canada, Moundsview, New

Brighton, North Oaks, Roseville, St. Anthony, Shoreview, Burnsville, Eagan, Anoka, Champlin, Ramsey, Andover, Blaine, Centerville, Circle Pines, Coon Rapids, Ham Lake, Lexington, Lino Lakes, Spring Lake Park, Columbia Heights, Hilltop, Deephaven, Excelsior, Greenwood, Long Lake, Medina, Minnetonka Beach, Minnestrista, Orono, St. Bonifacius, Shorewood, Spring Park, Tonka Bay, Victoria, and Woodland (collectively, the "Local Cities").

Lakeville agrees with the Local Cities that the main goal of the Commission in implementing the above provisions in the 1992 Cable Act is to ensure that "consumer interests are protected in the receipt of cable service." [Section 2(b) (4), 1992 Cable Act] We strongly disagree with the Commission's approach of attempting to establish benchmark rates that would have the effect of institutionalizing the existing monopoly based cable rates through the averaging of current cable rates which were not developed in a competitive market.

Ensuring Reasonable Rates - Why Not Benchmark Only?

The City believes that the Congressional intent is clear that effective competition is the overriding concern of Congress. To only develop rules applicable to prospective rate increases would create a system institutionalizing existing cable rates which were created in a non-competitive environment. The rules must establish a reasonable analysis of the cost of delivery of service recognizing the intent of Congress to be reasonable, first, to the cable subscriber. Therefore, a scheme for the rollback of basic rates must be established. Current cable rates must be reduced if necessary to ensure that they are "reasonable," as required by Section 623. Therefore, the FCC should be able to establish a rate, once a rate is deemed unreasonable.

A combination of benchmark rates and a cost-of-service analysis is the most applicable in this endeavor. If a benchmark is established, it cannot be based on existing non-competitively arrived at rates.

Congress clearly intended to allow for the regulation of basic rates at the local franchising authority level. Benchmarking would preempt local authority by creating a pre-decision at the federal level regarding "reasonableness." The costs for the delivery of cable service vary widely throughout the United States. Benchmarks applied to the delivery of cable service would be unreasonable both to the subscriber and to the cable operator.

The establishment of a benchmark based on current rates would merely institutionalize the monopolistic pricing of cable operators. The Cable Act states clearly that eight years of monopolistic pricing have produced rate escalation unacceptable to federal policymakers. If a benchmark approach is established, even attempting to analogize similarly situated systems, the FCC must establish such benchmarks by analyzing the preceding eight years of non-competitive rate escalation through the lens of a cost-of-service analysis.

Though establishing standard benchmark costs based on existing cable rates would minimize the local government expense of regulating cable, we contend that this would negate Congress' clear intention to allow for the regulation of basic rates at the local franchising level.

Instituting a Benchmark/Cost of Service Standard

Should some form of benchmark analysis be required, the City urges the FCC to separate cable systems into distinct classes based on specified variables and then define a benchmark for each class of system. [The City

believes that such an approach is merely a modified cost-of-service approach. Therefore, a benchmark should not be used and instead franchise authorities should be allowed to regulate based on a modified cost-of-service.] However, if the FCC insists on benchmarks, such benchmarks should only apply to similarly situated systems. Such factors could include homes passed per mile, number of subscribers, number of channels, system age, construction variables in systems such as underground cable and terrain crossed, programming costs, staffing levels, and other overhead considerations. Franchise obligations and franchise fees may be considered, but not in isolation. They should only be viewed as any other overhead requirement.

Should any form of benchmark analysis prevail, the City disagrees with the FCC's tentative conclusions that rates not "significantly" above the benchmark will be presumed reasonable. Instead, a rate exceeding a benchmark to any extent should be presumed unreasonable.

The FCC should beware of multi-tiered ownership structures which provide for internally generated and paid expenses, such as management fees and equipment leasing, which may not be market driven and should not be considered as overhead components unless they are devalued to equate with comparable services in the competitive market.

If the FCC insists on a benchmark standard, it must afford franchise authorities the opportunity to rebut the presumption that below-benchmark rates are reasonable. If an operator is entitled to use a cost-of-service method to show that above-benchmark rates are justified, the franchising authority must likewise be given the opportunity to demonstrate that below-benchmark rates are required in a particular instance. Moreover, the

operator must be required to provide the franchising authority the information necessary to make such a showing.

Lakeville supports the FCC offered alternative to pure cost-based approach or a benchmark approach. The City supports the concept that the FCC should prescribe guidelines for basic service regulation by which a local franchising authority could use an individual cable system's costs to define reasonable rates that allowed recovery for at least the direct costs of the channels in the basic tier, but no more than these costs, and a nominal amount of the joint and common costs of the cable system as a whole.

The City believes that while certain price cap alternatives might reduce government expense of regulation, a cable operator should only be allowed to pass through obvious and readily identifiable price increases if the cable operator is also required to reduce rates as a result of cost decreases.

Lakeville agrees with the FCC's tentative conclusion that franchise costs would include any direct cost of providing any services required under the franchise directly attributable to PEG channels and a reasonable allocation of overhead directly attributable to PEG channels.

The City also agrees with the FCC's tentative conclusions that the regulations adopted should apply to any changes in the level of service tiers that are initiated at the subscriber's request after installation of initial service and that the charges for changing the level of service should not exceed a reasonable, nominal amount when such changes are done by computer or other simple method.

The FCC should not permit higher rates for non-basic service rates in order to permit relatively low basic service rates. Assuming that basic service rate regulation will produce "reasonable" rates, rates for non-

basic service need not be escalated to make basic rates more "reasonable", and should, instead, be held to their own reasonableness standard.

Rules Concerning Evasion or Retiering

The City urges the FCC to recognize that cable operators may attempt to retier services as a way to avoid or minimize the impact of rate regulation. As Congress recognized, the manner in which a service is marketed and proceed remain determinative factors in deciding what is included as part of a service and whether that service is subject to regulation.

Congress' desire to prohibit rate evasion by retiering takes precedence over, and may limit, retiering rights under the 1984 Cable Act, 47 U.S.C. Section 545(d).

The FCC should negate, upon request of a franchising authority, any retiering that occurred since the date of the 1992 Cable Act but prior to the effective date of the FCC rules. Where a cable operator removes some services from a basic service tier after the Act was enacted, the tier to which those services were moved should be regulated as basic service.

Flexibility In Establishing Procedures

The Commission should permit local governments flexibility in establishing procedures and regulations for reviewing local basic cable rates, so long as such procedures and regulations are not irreconcilable with the certification requirements in Section 623(a)(3).

The City agrees with the FCC's tentative conclusions that a cable operator should bear the burden of proof for demonstrating that its rates comply with the FCC's regulations.

We urge the FCC to require that upon a determination that a rate is not reasonable, the local franchising authority should not be required to establish a "reasonable rate;" however, the cable operator has the right to resubmit a different rate and be subjected to subsequent additional rate proceedings.

Authority to Regulate

Section 623(b)(1) authorizes the Commission to regulate basic cable rates in franchise areas that are not certified to regulate rates. At a minimum the Commission should regulate rates in situations where a franchising authority requests the Commission to regulate rates.

Two or more franchise authorities may (but need not) file a joint certification and exercise joint regulatory authority. In Minnesota, many cities regulate cable franchises pursuant to a Joint Powers Agreement. The Joint Powers Commissions established pursuant to the Joint Powers Agreements are often the regulatory authorities for a number of municipalities. The FCC should permit Joint Powers Commissions the authority to apply for and receive certification on behalf of their member cities.

The FCC should regulate rates for basic cable service if a franchising authority submits a certification stating that it cannot meet the certification standards or if a franchising authority objects to rates but does not have the resources available to it to assert jurisdiction. The City believes that the FCC should exercise jurisdiction even in areas where the Commission has denied a certification request if the FCC receives a complaint of rate unreasonableness from a franchising authority.

The FCC should be able to establish a rate, once a rate is deemed unreasonable.

The cable operator should be subject to franchise remedies, including revocation or denial of renewal should the cable operator fail to comply with the rate decision.

The City agrees with the FCC's tentative conclusion that rates for the entire class of subscribers will be reduced where the rate was unreasonable, even where a single subscriber filed a complaint.

Complaint Review

In order to reduce administrative burdens on the Commission, the Commission should permit franchising authorities to initially review complaints that the rates for cable programming services are unreasonable under Section 623(c).

Cable subscribers which complain about rates should, in the City's opinion, approach a franchising authority first and not have the right of appeal directly to the FCC should the local franchising authority choose not to proceed further with the subscriber's objection.

The Burden of Proof for Effective Competition - Getting Certification

Given Congress' presumption that most cable operators are not subject to effective competition, the burden should be on cable operators to demonstrate that they are subject to effective competition. Franchising authorities should not bear the burden of demonstrating that cable operators are not subject to effective competition as a condition of certification to regulate rates.

Though the FCC should base its finding of effective competition initially on the determination by a franchising authority that effective competition does not exist in its franchise area, the franchising authority should be required to submit documentation to the FCC only upon a challenge to its finding by the cable operator.

A cable operator must challenge a finding of no effective competition prior to the FCC's approval of a certification request. Anything less than this procedure would raise an obvious cable operator delay tactic during the actual rate regulation proceedings. A certification should be in effect unless and until revoked.

Lakeville agrees with the Commission's conclusion that certification should be pursuant to a standardized and simple certification form similar to that located at Appendix D to the Notice of Proposed Rulemaking, but such form should be modified to eliminate the burden on local governments to demonstrate that a cable operator is not subject to effective competition. It should be assumed that competition does not exist unless the cable provider can prove otherwise. Much of the statistical data needed to make a thorough review of area competition may not be as available to the franchising authority as it is to the cable operator claiming competition exists.

Guaranteed Standing

Lakeville supports Section 623 preempting any state law that prohibits cable rate regulation, and franchising authorities may certify that they have the "legal authority" to regulate rates pursuant to home rule charters, their police powers, their right to regulate which grants a franchising authority the right to regulate a cable system. In addition,

Section 623(a)(2)(A) provides franchising authorities an independent source of power to regulate rates, regardless of any contrary state law provision. A franchising authority's right to regulate rates under Section 623 also includes the right to order rate reductions if necessary to ensure that a cable operator receives only a "reasonable" rate for basic cable service.

Costs Charged for Equipment

Rates for equipment used to receive the basic tier or installation rates required for the basic tier should be subject to "reasonable" basic rate regulation.

The rate for any installation and equipment used to receive basic cable service, regardless of whether such installation or equipment is also used to receive any other programming service, should be based on "actual cost" pursuant to Section 623(b)(3) -- thus subject to regulation by certified franchising authorities. Congress did not intend that such rates be subject to regulation by the Commission pursuant to Section 623(c).

Billing Procedures

The Commission's rules implementing the subscriber bill itemization provision, Section 622(c), should allow a cable operator to itemize only direct costs attributable to franchise fees, PEG requirements or other assessments, and should require a cable operator that chooses to itemize costs to disclose other costs to the public reflected in the bill, such as a cable operator's profit, payments on a cable operator's debt service, or any other items a franchising authority believes are appropriate to itemize in order to accurately reflect the costs in a subscriber's bill. In calculating franchise costs pursuant to Section 623(b)(4) that a cable operator may

itemize on his bill pursuant to Section 622(c), the Commission should make clear that such franchise costs are limited only to costs directly attributable to public, educational and governmental access requirements in a franchise.

Enforcement of Leased Access Rules

The Commission should permit franchising authorities that wish to do so to mediate leased access disputes, and to enforce the Commission's leased access rules. Such local enforcement would be in addition to the right of franchising authorities to enforce provisions in franchise agreements regarding the placement and use of leased access channels.

Lakeville urges the Commission to adopt the above proposals and the other proposals raised in the comments of our member organizations.

Respectfully submitted on behalf of
the City of Lakeville Cable TV Board
and City Council,

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by _____
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